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No. 79-1695

In the Supreme Court of the United States

OCTOBER TERM, 1979

ELECTRI-FLEX COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 71-84) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 65-70) are reported at 238 N.L.R.B. No. 97.

JURISDICTION

The judgment of the court of appeals (Pet. App. 86-87) was entered on January 28, 1980. The petition for a writ of certiorari was filed on April 26,

1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner failed to bargain in good faith with the union and thereby violated Sections 8(a)(5) and (1) of the National Labor Relations Act.

STATEMENT

1. In June 1975, District No. 122, International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union") began an organizational campaign at petitioner's plant in Roselle, Illinois. On August 15, 1975, following a successful election, the Union was certified as the bargaining representative of petitioner's production and maintenance employees. Negotiations for a collective bargaining agreement began on September 26, 1975. During the course of 12 bargaining sessions in the next year, petitioner and the Union made limited progress toward an accord. Thus, the parties agreed to provisions regarding union recognition, representation, nondiscrimination, discipline, and bulletin boards, and also reached agreement on military leave, jury pay, and some aspects of the arbitration, seniority, promotion and transfer, layoff and recall, and overtime provisions. However, despite the Union's substantial concessions on economic and noneconomic issues, no cognizable progress was made as to the significan collective bargaining issues, because petitioner unwaiveringly insisted on a harsh management rights

clause, no union security, no real improvement in economic benefits, and a contract of short duration.[1] Accordingly, in August 1976, the Union went out on strike (Pet. App. 4-5, 48-53, 71-72, 79-83).

During the 11-month negotiating period, petitioner discharged and suspended several pro-union employees. Petitioner also threatened various other employees with reprisals because they supported the Union, interrogated a prospective employee about his union sentiments, and attempted to coerce those employees who peacefully picketed at petitioner's plant. In addition, petitioner promised an employee a raise if he would not attend a union meeting regarding a

[1] Petitioner proposed a management rights clause which vested in itself the exclusive right to direct, manage and control the plant and its working force, including the right to discipline, promote, transfer, and lay off employees; the right to schedule and change working hours; the right to assign and subcontract work; the right to modify or eliminate incentive wage plans; the right to make reasonable rules of conduct, safety, and operation; and the right to implement new production methods and products (G.C. Exh. 38). Petitioner opposed the Union's maintenance of membership, as well as union shop, proposals (Pet. App. 49-52; G.C. Exhs. 32(c), (k), 53).

Petitioner completely rejected any general wage increase and made a wage classification proposal which would have lowered wages for a number of employees if it had not agreed to "red-circle" existing wages (G.C. Exhs. 35, 43, 47, 51). What benefits the Company offered were to be paid only to current employees involuntarily transferred by the Company to the second or third shifts—or to employees with 20 years' tenure (Pet. App. 50-51; G.C. Exhs. 51, 32(k), 35). Finally at the final bargaining session, the Company insisted on a contract expiration date less than six months away (Pet. App. 50-51).

strike vote and thereafter did not give the employee the raise. Finally, petitioner unilaterally imposed a new disciplinary rule regarding the use of safety glasses without notifying or negotiating with the Union (Pet. App. 7-57).

2. a. In *Electri-Flex I* (228 N.L.R.B. 847 (1977), enforced, 570 F.2d 1327 (7th Cir.), cert. denied, 439 U.S. 911 (1978)), the court of appeals agreed with the Board that petitioner committed multiple unfair labor practices in violation of Sections 8(a)(1), (3), (4) and (5) of the Act, 29 U.S.C. 158(a)(1), (3), (4) and (5), during the course of the Union's election campaign and the initial contract negotiations. Among other things, the court found that petitioner discriminatorily discharged, transferred, or laid off five employees and coercively threatened and interrogated numerous others. 570 F.2d at 1331-1332, 1338-1339. The court further found that petitioner unlawfully and unilaterally instituted a written warning system in response to the employees' union activity and unilaterally implemented new call-in and probationary period rules. *Id.* at 1332-1338.

b. In this case, which focuses on the period between May 1976 (the Board's hearing in *Electri-Flex I*) and February 1978, the Board found that petitioner violated Section 8(a)(1) of the Act by threatening and coercing employees and a prospective employee with regard to their lawful support of the Union, including peaceful picketing (Pet. App. 6-15). The Board further held that petitioner violated Sections 8(a)(1), (3) and (4) of the Act by discharg-

ing six employees and suspending another because of their union activities or participation in Board proceedings (Pet. App. 16-25, 29-48), and that petitioner violated Sections 8(a)(1) and (3) of the Act by withholding a pay raise and suspending still another employee because of his union activities (Pet. App. 25-28). Finally, the Board determined that, in violation of Sections 8(a)(5) and (1) of the Act, petitioner unilaterally instituted a new disciplinary rule regarding enforcement of a safety regulation and bargained with the Union in bad faith. This latter conclusion was based on the totality of petitioner's conduct, including its pervasive unfair labor practices and " 'unyielding rigidity during negotiations,' " which showed that petitioner " 'only went through the elaborate motions of bargaining * * * with no sincere desire of reaching an agreement' " (Pet. App. 56, 57, 65-66).

After thoroughly reviewing the record, the court of appeals upheld the Board's findings and enforced its order (Pet. App. 72-84). With regard to the finding of bad faith bargaining, the court observed that "[t]he ALJ conducted an exhaustive examination of the evidence and concluded that [petitioner] engaged in sham bargaining. This conclusion is fully supported on the record" (*id.* at 79). The court further explained that petitioner's "unyielding rigidity to truculent proposals—including the short contract term, the management rights clause, no union shop, union access, and no general wage increase, and the avoidance of bargaining on substantial issues was

substantial support for the Board to conclude that the Company * * * engag[ed] in bad faith bargaining" (Pet. App. 83).

ARGUMENT

Petitioner no longer disputes that it committed numerous unfair labor practices since the last Board order (*Electri-Flex I*) was issued against it. Rather, its sole contention (Pet. 9-18) relates to the Board's finding that it bargained in bad faith. But whether an employer has bargained in "good faith" with the chosen representative of its employees, as required by Section 8(a)(5) of the Act, involves a largely factual determination based on an appraisal of the total conduct of the parties. See, *e.g.*, *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 498-499 (1960); *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 409-410 (1952); *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring and dissenting). Here the court of appeals has affirmed the Board's findings in an extensive opinion upon which we rely. That decision does not conflict with any decision of this Court or of any court of appeals, and further review of the essentially factual question presented by petitioner is not warranted. *NLRB* v. *American National Insurance Co.*, *supra*, 343 U.S. at 409-410; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951).

In any event, the record fully supports the concurrent findings of the Board and the court of appeals.

See *NLRB* v. *Wright Motors, Inc.*, 603 F.2d 604, 608-610 (7th Cir. 1979). Petitioner unyieldingly insisted on extremely harsh provisions throughout the 11-month bargaining period despite substantial concessions by the Union during that same period. Thus, petitioner rigidly demanded a management rights clause—described by the Union's chief negotiator as the harshest he had ever seen (Pet. App. 49, 80)—which effectively reserved to it exclusive authority over all terms and conditions of employment. At the same time, petitioner refused to consider union security, a wage increase, or a contract of more than a year's duration. In contrast, the Union accepted or offered to accept several of petitioner's proposals, including a no-strike no-walkout clause, an arbitration clause, and various vacation, holiday and work hour proposals, and also agreed to withdraw its request for super seniority and a union shop. Moreover, throughout the negotiation period, petitioner committed numerous unfair labor practices designed to break the Union, including threats, interrogations, discharges, suspensions, and unilateral actions with regard to conditions of employment.

Petitioner erroneously contends (Pet. 10-12) that the court of appeals' decision is inconsistent with *Gulf States Manufacturers, Inc.* v. *NLRB*, 579 F.2d 1298 (5th Cir. 1978), aff'd en banc, 598 F.2d 896 (1979), and *NLRB* v. *Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978). As the court of appeals pointed out (Pet. App. 82), however, those cases are readily distinguished on their facts. See

also *NLRB* v. *Wright Motors, Inc., supra,* 603 F.2d at 609. First, neither *Gulf States* nor *Tomco* involved extensive, contemporaneous unfair labor practices as was the case here. Moreover, in both cases, the employer had made substantial concessions on many questions and had not insisted on terms so harsh as to evidence bad faith. See 579 F.2d at 1320, 1326; 567 F.2d at 875, 877, 881-883.[2]

Finally, petitioner argues (Pet. 12-13, 16-18) that the Board and court of appeals improperly refused to consider its evidence concerning the reasonableness of its collective bargaining proposals. In fact, however, the Board considered the testimony of petitioner's expert witness, but found it lacking in weight, because that witness "was not familiar with the totality of the negotiations and the circumstances surrounding the same and in effect, he was arriving at legal conclusions which was not his role" (Pet. App. 56). The court of appeals found the Board's conclusion on this point to be neither "arbitrary [n]or an abuse of discretion" (*id.* at 82 n.6).[3]

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[2] Nor is the court's decision contrary to *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970). In that case, this Court invalidated a Board order that specifically required an employer to grant the union a checkoff provision to which the employer had not agreed during the course of collective bargaining. The Board's order in this case does not require petitioner to agree to any proposal; it simply orders petitioner to bargain in good faith (Pet. App. 63).

[3] Petitioner erroneously suggests (Pet. 16-17) that the court of appeals stated that petitioner "introduced no evidence that its proposals were reasonable and made no concessions during the contract negotiations." The court actually concluded that petitioner's evidence failed to demonstrate

Likewise, there is no merit to petitioner's contention regarding the admissibility of its wage surveys. The ALJ excluded this evidence as inadmissible hearsay (Tr. 1045, 1053-1055, 1057-1058), and petitioner failed to file an exception to that ruling before the Board. Accordingly, petitioner cannot now be heard to complain. See 29 U.S.C. 160(e); *Detroit Edison Co.* v. *NLRB,* 440 U.S. 301, 311 n.10 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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that "its extreme proposals were not unreasonable or irregular" and "that [petitioner] made no significant concessions on issues that go to the heart of collective bargaining contracts" (Pet. App. 82).

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